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Supreme Court of the United States

OCTOBER TERM, 1945

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

No. 518. 23

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

No. 519. 30

On Writ of Certiorari to the Supreme Court of the State of New York

REPLY BRIEF FOR PETITIONERS

February 28, 1946.

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Counsel for Petitioners.

ISAAC C. DONNER,
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Supreme Court of the United States

OCTOBER TERM, 1945

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners,* *against* CARTER & WEEKES STEVEDORING COMPANY, *Respondent.*	No. 518
JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners,* *against* JOHN T. CLARK & SON, *Respondent.*	No. 519

On Writ of Certiorari to the Supreme Court of the State of New York

REPLY BRIEF FOR PETITIONERS

The brief submitted on behalf of John T. Clark & Son, respondent in No. 519, sets forth the argument of respondents in both of these cases. The brief of Carter & Weekes Stevedoring Company, respondent in No. 518, consists merely of a statement adopting as its own the arguments set forth in the brief of respondent Clark, except for POINT I of that brief. For convenience, therefore, this brief is filed under a single cover in reply to both respondents.

The issues presented in both cases are concededly identical. As to POINT I in respondent Clark's brief, pertaining to the taxability of its receipts from its stevedoring operations in New Jersey, petitioners state again, as they did

in their main brief in that case (p. 3), that they do not here, as they did not in the New York State courts, press the issue of the taxability of those receipts, and do not here seek to sustain the tax as to those receipts.

POINT I

The principles of the *Western Live Stock* and later cases are applicable to cases involving interstate transportation of goods. The same constitutional principles apply in determining the validity of State taxes under the Commerce Clause to all cases involving interstate commerce, whether the commerce consists of interstate sales of goods or their transportation interstate.

In their briefs, respondents raise no issue concerning the fact that their stevedoring activities, the receipts from which are sought to be taxed, are wholly within the City of New York. Nor do they question the fact that the decision in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), is inconsistent and irreconcilable with the principles of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and the later cases upon which petitioners rely.

However, respondents seek to avoid the effect of the *Western Live Stock* and later holdings by asserting that since those cases involved taxes on gross receipts from interstate sales of goods, they are not applicable to and do not affect cases involving taxes on gross receipts from interstate transportation, in which category respondents place the *Puget Sound* and the instant cases (Resp. Br., pp. 20-24). They assert, moreover, that the tax here involved is susceptible of duplication in other jurisdictions (Resp. Br., pp. 24-29).

There is no merit to either contention.

(1)

The Commerce Clause authorizes Congress to regulate "commerce" with foreign nations and among the several States. This includes any commercial activity which can be regarded as interstate or foreign in nature and affords no basis for distinctions between different types of activity. As this Court said in *Adair* v. *United States*, 208 U. S. 161 (1908), at pp. 176-177:

> "Let us inquire what is commerce, the power to regulate which is given to Congress?
>
> This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have been given—that commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several States, but not to that commerce 'completely internal, which is carried on between man and man, in a State, or between different parts of the same State, and which does not extend to or affect other States'. The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed."

See, also: *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 550-551 (1944); *Hopkins* v. *United States*, 171 U. S. 578, 597 (1898); *Gibbons* v. *Ogden*, 9 Wheat. 1, 189-191, 194 (1824).

This Court has in fact held that it includes transportation as well as sales or other forms of commercial intercourse.

> "Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."
>
> *Currin* v. *Wallace*, 306 U. S. 1 (1939), at p. 10.

Hence, regardless of whether the interstate commerce consists of transportation or sale of goods, the same question must be considered in determining the validity of a State tax under the Commerce Clause—does it regulate the commerce? If on the facts the tax does regulate the commerce—i.e., interferes with, discriminates against or unduly burdens the transportation or the sale—it is invalid regardless of whether the commerce consists of transportation or sale. If, on the other hand, the facts indicate the State tax does not regulate the commerce, it is valid, also regardless of whether the commerce be interstate transportation of goods or interstate sale of goods.

(2)

Assuming for present purposes the validity of respondent's claim that they are engaged in interstate transportation, the *Western Live Stock* case itself demonstrates the utter lack of substance in respondents' contention that that case is not applicable here because it involved interstate sales and not interstate transportation.

In the *Western Live Stock* case, this Court examined its prior decisions on the validity of State taxes under the Commerce Clause and synthesized them into a pattern from which the principles therein expressed clearly emerged. In analyzing its prior decisions and developing those principles, this Court made no distinction whatever between interstate sales and interstate transportation cases. Cases of both kinds were cited interchangeably as illustrative of certain principles. Thus, for example, in support of the principle that no undue multiple burden exists where the tax is fairly apportioned to the commerce carried on within the taxing State, the Court cited many transportation cases, including *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217 (1891), and *Wisconsin & Michigan Ry.* v. *Powers*, 191 U. S. 379 (1903), as well as *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1 (1892), and *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), both of which involved interstate trade rather than transportation.

Indeed, most of the cases cited by the Court in the *Western Live Stock* case to support and illustrate the cumulative-burden concept were cases involving taxes measured by gross receipts derived from interstate transportation (see *Western Live Stock* v. *Bureau of Revenue, supra,* at pp. 256-257).

This Court has similarly cited interchangeably both interstate sales and interstate transportation cases in the other decisions upon which petitioners rely. See, *e.g., McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33 (1940); *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434 (1939); *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307 (1938).

Therefore, no basis exists for the distinction sought to be drawn by respondents. The doctrines of the *Western Live Stock* case apply with equal vigor to any case involving State taxation of interstate commerce irrespective of the form it takes, because: (1) in so far as constitutional principles are concerned, this Court has made no distinction between a tax on gross receipts from interstate transportation of goods, and one on gross receipts from interstate sales of goods; and (2) in deciding the *Western Live Stock* and subsequent cases this Court considered and cited as applicable both types of cases without distinction.

POINT II

There is no possibility of a duplication of the tax here involved, in form or in substance, upon these respondents, their receipts or their activities in any other jurisdiction.

(1)

Respondents, admitting that the tax is non-discriminatory (Resp. Br., p. 27) and that their activities here involved take place wholly within the taxing jurisdiction of New York City (Resp. Br., p. 2), assert nevertheless

that a possibility of multiple taxation exists here because the cost of stevedoring services is an element in the ultimate cost of the goods shipped, the sale of which may at some future time be subjected to another tax. Respondents refer to the *dissenting* opinion in *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* as showing that such a possible sales tax upon such an eventual sale will be a duplication of tax (Resp. Br., p. 26).

This is an assertion, in effect, that there is duplication of tax because the tax may be passed on. There is, however, no proof in the record that the tax here involved was or will be, or can be (considering the effect of other relevant factors such as competition, for example), passed on. Even if it were to be passed on, it would be an economic burden, not a legal or tax burden. It would be an additional cost of doing business just as would any other expense or any other tax paid. Such an economic effect does not constitute a barrier to the tax under the Commerce Clause, for as this Court said in the *Berwind-White* case, *supra,* at page 46:

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business."

(2)

Respondents also assert that since their receipts are based upon a rate per ton of freight, the tax here involved is in effect a toll upon every ton of freight in interstate or foreign commerce, and "if New York City can levy such a tax * * * so can every other state and municipality along the line of the interstate journey" (Resp. Br., p. 26).

No syllogistic reasoning of this kind can transform the tax here involved into a tax upon transportation or upon freight. This is a general tax upon all persons doing business within the City. It is not aimed at or based upon freight, any more than it is directed at the shoes or signs or trucks or any other article manufactured or dealt with

by any person doing business in the City. It would apply to respondents' receipts regardless of the basis upon which respondents charge their customers—whether the charge be per ton of freight, or per man employed, or per day or hour, or per cubic foot or square foot of ship hold filled or cleared, or upon any other basis.

The situation of these respondents is similar to that of the taxpayer in *Coverdale* v. *Pipe Line Co.*, 303 U. S. 604 (1938). The tax there was upon the generation of energy used to pump natural gas through pipe lines in interstate commerce—not upon the gas itself, the subject of the commerce. In the cases at bar the tax is upon stevedoring activities which assist the movement of goods in interstate commerce—not on the goods. What was said by this Court in the *Coverdale* case with respect to possible duplication of tax in other jurisdictions, is just as applicable here, and disposes of respondents' contentions. Thus, *Coverdale* v. *Pipe Line Co., supra,* at pages 612-613:

> "It is true that each state through which a pipe line passes could lay a tax on the use of engines for the production of power, but that would not be multiple taxation 'merely because interstate commerce is being done', as discussed in *Western Live Stock* v. *Bureau of Revenue*, ante, p. 255, and the authorities there cited. It would not be a tax on the same activity, either in form or in substance. Like a property tax on the pipes or equipment in different states, it would be a different tax, on a different and wholly separate subject matter, with no cumulative effect caused by the interstate character of the business. It would not be multiple taxation for each state to tax the 'booster station' *ad valorem* as property. Neither is it prohibited multiple taxation to have the possibility of other privilege taxes on the production of power. *It is length of line, not interstate commerce, which makes another tax possible.*" (Italics supplied.)

The loading and unloading activities of these respondents are, to be sure, connected with activities carried on by other persons in other jurisdictions. However, it is

clear that any taxes which other jurisdictions might impose could not fall on these respondents, nor upon the activity or receipts which are the subject of the tax here involved. The taxes of other jurisdictions, if any, could only be on a portion or fraction of the over-all haulage, exclusive of the activity sought to be taxed here.

The fact that the respondents may be subject to other taxes imposed by the State of New York or by the City of New York (see Resp. Br., p. 25) does not, of course, render the present tax a "double burden" or affect its validity under the Commerce Clause. Certainly these other taxes do not result because respondents engage in interstate commerce, nor do they impose additional burdens upon respondents because they engage in an activity in interstate commerce.

Nor does the fact that the revenues from the tax are used for unemployment relief affect the question here involved (see Resp. Br., p. 25). Relief of unemployment is as much a proper governmental purpose as is highway maintenance or police protection. *New York Rapid Transit Co.* v. *City of New York*, 303 U. S. 573 (1938), at 584 *et seq.*, and cases cited.

POINT III.

The imposition of the tax at bar does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Even if we assume that corporations engaged in foreign ocean commerce can be regarded as exempt from a tax on their gross receipts under the provisions of New York Tax Law, § 4, subd. 11 (referred to and quoted in respondents' brief, p. 30), which exempts such corporations from tax on "their capital stock, franchises and earnings", the tax at bar does not violate the Equal Protection Clause of the Fourteenth Amendment, since corporations engaged

in foreign ocean commerce may for tax purposes properly be treated differently from stevedores. *New York Rapid Transit Co.* v. *City of New York*, 303 U. S. 573 (1938); *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495 (1937); *Puget Sound Co.* v. *Seattle*, 291 U. S. 619 (1934); *Liggett Co.* v. *Lee*, 288 U. S. 517 (1933).

POINT IV

The tax at bar does not interfere with the power of Congress over navigation.

Respondents assert (Br., pp. 33-34) that the tax at bar interferes with the paramount power of Congress over navigation. From respondents' bare statement of this contention, it is not clear whether they rely upon the power of Congress under the Commerce Clause to regulate navigation (*Gilman* v. *Philadelphia*, 3 Wall. 713, 724-725 [1866]), or upon the implied power of Congress to make laws carrying into effect the provisions of Article 3, § 2, cl. 1 of the Constitution, which confers admiralty and maritime jurisdiction upon the courts of the United States.

The generic term "commerce" includes navigation, and the power of Congress to regulate interstate and foreign commerce comprehends the control of navigation for that purpose. See *Gilman* v. *Philadelphia*, *supra*. Assuming that the respondents refer, in this connection, to the power of Congress over navigation under the Commerce Clause, this is merely another way of saying that the tax at bar regulates interstate and foreign commerce. Our discussion of the validity of the tax here involved under the Commerce Clause thus covers this point.

If, on the other hand, respondents are to be regarded as relying on the Judiciary Article of the Constitution (Art. 3, § 2, cl. 1), conferring admiralty and maritime jurisdiction on United States courts, their contention is equally without merit. *Standard Dredging Co.* v. *Murphy*, 319 U. S. 306 (1943).

In the case just cited, it was claimed that the New York State Unemployment Insurance tax was an infringement of federal maritime jurisdiction in a situation where, it was alleged, the Federal Government had acted by virtue of the Federal Social Security Act to bar the State tax there involved. What this Court said there is even more pertinent in the situation at bar where it is not even claimed that the Federal Government has acted to preclude the present tax (319 U. S. 306, at p. 310):

> "We hold that nothing in Article 3, § 2 of the Constitution places this tax beyond the authority of the State."

Hence, whether respondents' contention be regarded as based upon the Commerce Clause (Art. 1, § 8, cl. 3) or on the admiralty jurisdiction provision (Art. 3, § 2, cl. 1), the tax at bar is valid and does not constitute an unlawful interference with the power of Congress over navigation.

POINT V

The tax at bar does not violate Article 1, Section 10, Clause 2 of the Constitution of the United States, which prohibits State "imposts or duties on imports or exports".

Respondents assert that this tax necessarily increases the cost of their services and, therefore, the cost of importing and exporting the goods which they load and unload; and that this increase in cost constitutes an impost on exports and imports in violation of Article 1, Section 10, Clause 2 of the Constitution (Point IV, Resp. Br., pp. 31-33).

As has been pointed out in another connection there is not the slightest proof in the record that the economic burden of this tax has in fact been passed on by the respondents to the shipowners, or by the shipowners to the ex-

porters or importers of the goods. Therefore, even if respondents' theory were sound (which it is not), the tax here involved has not actually been shown to be a prohibited impost or duty.

In any event, while the economic burden of the tax, if shifted, would indirectly add to the cost of exporting and importing, it would not render this tax an impost or duty on an export or import. Every federal, state and local tax —just as any other expense—which the respondents pay may possibly be reflected indirectly in their charges to the shipowner and in the shipowner's charges to the exporter or importer. It is obvious, however, that such economic factors are not duties or imposts upon the goods exported or imported.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292 (1917), relied on by respondents in this connection, does not support the proposition urged. The State tax involved in that case was directly on a vendor's gross receipts from foreign sales, shipped directly by the vendor from the taxing State to foreign countries. Even assuming that the *Crew Levick* case held that such a tax, imposed directly on the exporter and upon his receipts from his foreign sales, is a duty on exports (and, as we shall see, this is not at all clear), that case is not authority for the proposition that the tax at bar—not measured by receipts of a seller or an exporter of goods, but by the receipts of a stevedore indirectly and remotely connected with the export or sale—is an impost or duty barred by the Export-Import Clause.

It seems more likely, however, that the *Crew Levick* case invalidated the tax there involved, under the Commerce Clause rather than the Export-Import Clause. While the Court stated in that case (245 U. S. at 295) that the "foreign commerce" and "the export" clauses could "for the purposes of this case * * * be regarded as interchangeable * * *", its entire reasoning was based on the Commerce Clause, and it relied for its decision on authorities which involved interstate commerce (see *ibid.*, pp. 295-296,

297-298). Moreover, this Court has repeatedly regarded it as a case decided under the Commerce Clause (see, *e.g.*, *Western Live Stock* v. *Bureau of Revenue*, *supra*, at p. 255; *Adams Mfg. Co.* v. *Storen*, *supra*, at p. 312; *Gwin, White & Prince Inc.* v. *Henneford*, *supra*, at p. 439).

Since the tax involved in the *Crew Levick* case was not allocated in any way, although obviously applied to transactions which covered activities transcending the boundaries of the taxing State, the tax was invalid under the Commerce Clause under the principles since promulgated in the *Adams Mfg. Co.* and *Gwin, White & Prince* cases, *supra*.

CONCLUSION

The final order and judgment in each of the cases should be reversed and the petitioner-Comptroller's determination in each case should be reinstated.

Dated: New York, N. Y., February 28, 1946.

Respectfully submitted,

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